Jan Wiktor TKACZYŃSKI
Institute of European Studies

THE ENVIRONMENTAL POLICY IN THE EUROPEAN UNION

Although the European Economic Community did not indicate its range of competencies with regard to the protection of the natural environment until the Single European Act (SEA) of 1987;[1] as a result of the European Community Treaty (ECT) art. 130r [presently art. 174], was then included the legal steps of this sphere of the Community's politics can be traced back to about 1967.[2] The first act was a combination of what was then art. 100 [presently art. 94] with art. 235 of the ECT [presently art. 308], which authorized the Community to take appropriate steps, if 'the actions of the Community prove to be necessary to achieve, […] one of the Community's goals, and this Treaty did not foresee the other competences for the required action […].'

On the basis of the arrangements made by the heads of state and the heads of government of the Member States in 1972, the principles of environmental protection in the Community have created successive frameworks. These have subsequently been transformed into Action Programmes that cover the periods: 1973-1976 (I. Programme), 1977-1982 (II. Programme), 1983-1986 (III. Programme), 1987-1992 (IV. Programme), 1993-2001 (V. Programme) and 2002-2012 (VI. Programme). Directive no. 85 L 337 of 1985, which states that specified public and private projects must be assessed on whether they conform to certain environmental standards,[3] should be recognised as a milestone in the devel-

[1] See 'The Single European Act', *OJ (EC)*, No. 169 L, 29 June 1987.

[2] See L. Krämer, 'Die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zum Umweltrecht 1992 bis 1994', *EuGRZ*, No. 3-4 (1995), pp. 45-53.

[3] 'Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment', *OJ (EC)*, No. L 175, 5 July 1985, as last amended by the 'Regulation (EC) No. 97 L 11', *OJ (EC)*, No. L 73, 14 March 1997 and '03 L 35', *OJ (EC)*, No. L 156, 25 June 2003.

opment of the Community's policy towards environmental protection. Due to the control standards which were introduced as a result of it, one can compare, without exaggeration, its importance to the already mentioned art. 130r [art. 174] of the ECT, which was crucial for building the Union's policy regarding environmental protection.

1. THE COMMUNITY'S POLICY OF ENVIRONMENTAL PROTECTION – MATTERS OF DEFINITION

Despite significant achievements in the field of environmental protection laws, it was and still remains puzzling that attempts to define the term 'natural environment' in legal terminology have not been made until today. This opens great interpretational possibilities, which are not only – one might add – beneficial for the natural surroundings of man. Although this plurality of meanings does not always allow for an unambiguous establishment of the definition when it comes to the term 'natural environment,' it does at least make its reconstruction possible. Already the first environmental directive[4] of 1967, which has been repeatedly amended since then, contains in art. 2 the following elements of the incriminated term: on the one hand, water, air and soil, as well as the mutual influence between them; and on the other, its relationto living organisms.

Similarly, Directive no. 75 L 439 of 1975[5] and the Directive no. 82 L 883 of 1982,[6] included water (including earth water), the earth's surface and its inner layer, as well as air in the term 'environment.' In the already mentioned Directive 85 L 337, however, we can find such elements as the human being, flora and fauna, soil, water, air and landscape, while their mutual influence is also indicated. Surprisingly, the authors of the Directive included cultural heritage as well.

If the elements of the natural environment mentioned in other parts were to be taken into consideration, such as the nuisance caused by noise or unpleasant smells,[7] the health of the human being,[8] and finally minerals, biotopes and ecological

[4] See 'Council Directive No. 67 L 548 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances of 27 June 1967', *OJ (EC)*, No. 196, 16 August 1967.

[5] See 'Council Directive No. 75 L 439 on the disposal of waste oils of 16 June 1975', *OJ (EC)*, No. L 194, 25 July 1975, as last amended by the 'Directive 00 L 76 on waste disposal, 4 December 2000', *OJ (EC)*, No. L 332, 28 December 2000.

[6] See Council Directive No 82 L 883 on the procedures for the surveillance and monitoring of areas under threat from waste from the titanium dioxide industry of 3 December 1982in OJ (EC) No L 378 of 31 December 1982.

[7] See Council Directive No 75 L 442 on waste of 15 July 1975in OJ (EC) No L 194 of 25 July 1975, as last amended by Directive No 06 L 12 on waste of 5 April 2006inOJ (EC) No L 114 of 27 April 2006.

[8] See 'Council Directive No. 86 L 278 on the protection of the environment, and in particular of soil, when sewage sludge is used in agriculture of 12 June 1982', *OJ (EC)*, No. L 378, 31 December 1982.

systems,[9] it could be ultimately acknowledged that the following elements – which influence one another – make up the definition of natural environment as understood by the Community: the human being, animals, plants, the earth's surface and its inner layers, water, air, climate, biotopes and all ecological systems, surroundings and landscapes, peace and quiet, natural smells and cultural heritage.[10] Such a composition of the presented term also implies another important statement; that is, the protection of the natural environment results from the intended actions of humans, therefore it is not defined by nature, acting so to say of its own accord. This anthropocentric starting point in the matter of environmental protection is well documented by other legal acts of the European Union. Among them, the most important one should be accredited to the Resolution issued by the Council of the European Union on 1 February 1993,[11] which drafted a programme that goes beyond the year 2000 'For continuous and ecologically legitimate development.' The novelty of this programme, known as the V. Action Programme, was not only the presentation of a huge amount of data concerning the state and the forecast in the scope of environmental protection development in Europe,[12] but also that it specified the existing threats. They are mentioned here not only as a matter of fact, but mainly because like no other example they can be used to demonstrate the global challenges which we are facing, and which to a large degree we can solve only together. These are: climate change, air and water pollution, the unsustainable exploitation of natural resources, the decreasing number of flora and fauna species, the degradation of urban surroundings and coast areas, and finally, the problem of industrial and municipal waste.

Clearly, the list had an effect, since the VI. Action Programme for the years 2002-2012 is not only a depository of sublime words and even more sublime appeals, but a Programme that contains an adequately clear and defined concept of action.[13] Its realisation, however, remains dependent not so much on the amount

[9] See 'Council Directive No. 90 L 220 on the deliberate release into the environment of genetically modified organisms of 23 April 1975', *OJ (EC)*, No. L 194, 25 July 1975, as last amended by 'Directive No 01 L 18 concerning the placing on the market of genetically modified maize and pursuant to the Council Directive 90/220 of 12 March 2006', *OJ (EC)*, No. L 114, 27 April 2006.

[10] By 'environment', the Polish legislator understands: 'natural elements in general, also including those transformed as a result of human activities, especially earth surfaces, minerals, water, air, landscape, climate and other elements of biological diversity, as well as the mutual relationships between them", in 'Act – Environmental protection law of 27 April 2001', *Dziennik Ustaw*, No. 25 (2008), pos. 150.

[11] See 'Resolution of the EC Council and representatives of Member State governments, meeting within the Council on 1 February 1993, concerning the Community Action Programme and Policy in relation to the natural environment and balanced development', *OJ (EC)*, No. C 138, 17 May 1993.

[12] See M. Schröder, 'Postulate und Konzepte zur Durchsetzbarkeit und Durchsetzung der EG-Umweltpolitik', *NVwZ*, No. 4 (2006), pp. 389-395 and W. Frenz, 'Umweltschutz und Wettbewerbsfreiheit vor dem Hintergrund nachhaltiger Entwicklung', *NuR*, No. 3 (2006), pp. 138-145.

[13] See 'European Parliament and Council Resolution No. 1600/2002 of 22 July 2002 on the Sixth Environment Action Programme', *OJ (EC)*, No. L 242, 10 September 2002.

of money that is spent, but more on the acceptance of such systemic solutions, which will enable a faster and easier application of the community law at the level of national legal systems. It could be argued that all this was possible due to a substantive change in the Community's integration policy. For if successive stages of European integration have, up until now, determined the introduction of a common currency in recent years, the abolition of border controls (Schengen), or making it possible to trade the rights of emitting greenhouse gasses, then in the coming years, this role will be taken over by giving away public goods to the disposalof the European consumer. The protection of the natural environment is a public good which in contrast to, for example, the interests mentioned above is not characterised by the rivalry or exclusivity of their availability because parties contributing to the protection of the environment profit from such participation and do not violate the advantages of other participants that result from such activity (the lack of rivalry). At the same time, it is not possible to confine the effects of environmental protection to national borders (the lack of exclusiveness). Meanwhile, the European Union, in order to be as effective as possible in ensuring the highest level of welfare resulting from the condition of the natural environment must use the supranational *spill-over-effect* that its actions generate, taking into account the high level of environmental protection in some countries and the high pollution in other countries.[14]

2. THE PRINCIPLES OF THE OPERATION OF ENVIRONMENTAL LAWS IN THE EUROPEAN UNION

It should be noticed that while art. 174 section 1 of the ECT in regard to the range of the Community's environmental policy formulates the goals and in a way defines the result, this same article in section 2 describes the way, and therefore the means, which enable the implementation of its aims. These solutions are not typical when it comes to Community law. This is because in the scope of other European Union policies, while it is true that we read also about aims, more often than not, this bequest does not translate into the instruction for shaping a specific community policy by the given principles of action.[15]

It is understandable, that this kind of situation encourages national legislators to change their own legal systems. This action here may naturally assume a form of accepting appropriate legal changes; however, it can also be a result of cooperation both on the level of the Community, as well as nationally. At the same time, a lack of clearly defined rules of cooperation between Member States and the European

[14] See D.T.G. Rübbelke, 'Europäische Klimapolitik – Zentral oder dezentral?', *Wirtschaftsdienst*, No. 2 (2004), pp. 128-132.

[15] See L. Krämer, 'Das Verursacherprinzip im Gemeinschaftsrecht. Zur Auslegung von Artikel 130r EWG-Vertrag', *EuGRZ*, No. 15/16 (1989), pp. 353-361. Here p. 356.

Union as well as between national and the Community judiciary,[16] does not diminish the significance of this form of cooperation according to art. 234 of the ECT. Moreover, at the present moment, this cooperation is not articulated particularly clearly, as in the case of applying community principles to the protection of the natural environment.

2.1. The principle of a high level of environmental protection

By analysing the policy of environmental protection, and attempting to understand its standards by the community's legislator, in the Treaty of the European Union we come across two such regulations. The first, art. 95 section 3 of the ECT, imposes upon the Commission the requirement of including in all its propositions concerning the natural environment (according to art. 95 section 1 of the ECT) a need to ensure a high level of protection. In this case, the Council and the European Parliament were also given a similar aim.[17]

However, when one examines the second regulation, one can note the following statement: art. 174 section 2 sentence 1 of the ECT generally formulates, that the community's environmental protection policy must, taking into account the variety of conditions in particular regions of the European Union, endeavour to ensure (and preserve) a high level of protection of the environment.[18] The wording contained in both the mentioned regulations suggests that they include within their scope of application a legal obligation,[19] a violation of which may raise either an objection to such a violation or even invalidity of the given legal act.[20]

Notwithstanding the above mentioned ambiguity, however, it is necessary to draw attention to the term 'high level of protection;' this in no way means 'the highest…,' which of course would not only significantly extend the margin of the requirement, but also the level of compulsion, or even the possibility of including economic and political aspects in the analysed segment of the Community's policy.

The sectional clause contained in art. 6 of the ECT is an argument for this kind of interpretation, which says that art. 174 section 2 sentence 1 of the ECT may be treated as a general rule of action, both in relation to other – binding – community le-

[16] See S. Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluß*, Tübingen 1999, p. 47. n.

[17] See W. Schroeder, 'Die Sicherung eines hohen Schutzniveaus für Gesundheits-, Umwelt- und Verbraucherschutz im europäischen Binnenmarkt', *DVBl.*, No. 4 (2002), pp. 213-221. Here p. 214.

[18] Ibidem, p. 213 n.

[19] From literature on the subject: E. Grabitz, Ch. Zacker, 'Die neuen Umweltkompetenzen der EWG', *NVwZ*, No. 4 (1989), pp. 297-303. Here p. 300; P.-Ch. Müller-Graff, 'Die Rechtsangleichung zur Verwirklichung des Binnenmarktes', *EuR*, No. 2 (1989), pp. 107-151. Here p. 136; I. Pernice, 'Kompetenzordnung und Handlungsbefugnisse der Europäischen Gemeinschaft auf dem Gebiet des Umwelt- und Technikrechts', *Die Verwaltung*, No. 1 (1989), pp. 1-54. Here p. 9; W. Haneklaus, 'Zur Verankerung umweltpolitischer Ziele im EWG-Vertrag', *DVBl.*, No. 21 (1990), pp. 1135-1141. Here p. 1138.

[20] See the jurisdiction of the Court of Justice of the EU of 14 July 1998 – C-284/95 – Safety Hitech Srl vs. S. & T. Srl, in EuGH Slg. 1998, I-4301.

gal acts, as well as the European Union institutions of government that apply them. In other words, the entire set of regulations of the community concerning environmental protection must in the first place ensure a high level of protection, and the institutions of government that are substantially involved in applying them, have an obligation to comply with this legal state.[21] All of this, in accordance with the above mentioned art. 6 of the ECT, means that it is obligatory to comply with the requirements of environmental protection when implementing the other policies of the Community.

The necessity of including the various conditions in particular regions of Europe does not help when defining the boundaries of the inherently ambiguous term, a 'high level of protection.' For, if we consider that the conditions of protection in the mentioned regions serve as the *sine qua non* when it comes to defining the Community's environmental protection policy according to art. 174 section 3 pt. 2 of the ECT, then art. 174 section 2 sentence 1 could be interpreted as suggesting that a 'high level of protection' remains dependent upon the conditions in these regions. Thus Therefore, no absolute but only relative character can be applied to the term 'high level of protection.' Or, more distinctly, depending on the situation in a given region – collating it with an average established standard of 'high level' – one can talk about its higher or lower level.[22]

Acknowledging, even including the various conditions in particular regions of the European Union as an integral element when it comes to understanding environmental protection, leads to the claim that the term *environment* has features of a local character, and is not universal or Communal. Moreover, the quality of such an understanding of the definition of the environment can be assessed only in the context of a specific situation in time and space. However, a term prepared in such a way cannot be viewed as a gate, which can be used to circumvent the *lege artis* of specific community requirements. If this were the case, it would mean a peculiar interpretation of art. 174 section 2 sentence 1 of the ECT, which would require the lowering of standards when it comes to the range of environmental protection. And this is only because it is a much easier procedure than managing the high expectations of the European legislator[23] in this aspect.

2.2. The principle of prevention

The meaning behind art. 174 section 2 sentence 2 of the ECT does not leave any room for doubt: the community's policy of environmental protection should also respect the principles of prevention and the care for its state.[24] On the basis of adopting

[21] See A. Epiney, *Umweltrecht in der Europäischen Union*, Köln 2005, p. 99.

[22] Ibid., pp. 99-100.

[23] See E. Grabitz, M. Nettesheim, 'Artikel 130r' in E. Grabitz (ed.), *Kommentar zum EWG-Vertrag*, München [collection continually supplemented], Rdnr. 71.

[24] See C. Calliess, 'Zur Maßstabswirkung des Vorsorgeprinzips im Recht', *VerwArch*, No. 3 (2003), pp. 389-418.

such a way of thinking (acting) lies the conviction that the emergence of possible ecological destruction can be averted by using preventive measures. In other words, it is better to ensure that they do not take place rather than later dealing with their consequences. Introducing such a distinction between prevention and care, which has not been noticed by the European Court of Justice,[25] makes sense in that it helps to facilitate precautionary actions in the latter case, when such (potential) dangers emerge.

It is different when we talk about the former instance. Here, the aim of applying adequate measures is in no way the only potential danger, but a threat that actually exists. Hence, it is impossible to agree with the argument of those who believe that because the regulation of care also embraces/contains the preventive measures which allows us to react to such threats, then it is nevertheless a wider term than the regulation of prevention.[26] Given that these regulations are not free from ambiguity,[27] when we analyze them two areas need to be highlighted:

– the first constitutes a decrease in the threshold of acceptability of the application of preventive measures of the Community,

– the second is constituted by a hasty reduction of the content of the care principle to, above all, the preventive aspect.

While history teaches that appealing to the public's interest is especially dangerous when it is dressed in ideological figleaf from the top shelf of human virtues, the claim that in the name of these (of course noble) values, some reservations can be overlooked has become a regular assertion with regard to environmental protection. Hence the appeal to the general interest can be treated in this field as a sufficient reason for violating the interests of private entities. However, we must emphasise, this means interests, not rights.

The border, which efficiently protects against the infringement of the mentioned laws, under the pretence of violating only single interests, applies the principle of proportionality; this, in effect, means as many measures as there are dangers. This principle, although convincing at first glance, is not very effective in practice. Even if the EU Court of Justice's[28] judgment is recognised as being authoritative in rela-

[25] The European Court of Justice formulates the principle of prevention (without distinguishing prevention and care) in the following way: '(…) it is for the Community and the Member States to prevent, reduce and, in so far as is possible, eliminate from the outset", in jurisdiction of the Court of Justice of 5 October 1999 – C 175/98 (Paolo Lirussi) and – C 177/98 (Francesca Bizarro) (related cases), in EuGH Slg. 1999, I-6881, No 51; similarly in the jurisdiction of 22 June 2000 – C 318/98 – (Giancarlo Fornasar and others), in EuGH Slg. 2000, I-4785.

[26] See G. Lübbe-Wolff, 'IVU-Richtlinie und Europäisches Vorsorgeprinzip', *NVwZ*, No. 8 (1998), pp. 777-785.

[27] See I. Appel, 'Europas Sorge um die Vorsorge. Zur Mitteilung der Europäischen Kommission über die Anwendbarkeit des Vorsorgeprinzips', *NVwZ*, No. 4 (2001), pp. 395-398.

[28] In the so-called BSE jurisdiction we read among others: 'Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent', in jurisdiction of the Court of Justice of 5 May 1998 – C-180/96 – Vereinigtes Königreich vs. Kommission, in EuGH Slg. 1998, I-2265, No. 90.

tion to environmental protection, then both the range of those laws considered to be binding, as well as the instruments accredited to it, will remain unclear.[29]

It is completely different, however, when we interpret the regulation of care only in the categories that are applied to preventive measures. For this kind of procedure leads to the impoverishment of the mentioned regulation. Meanwhile, (this is not always remembered that the sense of care about the condition of the environment can be laid out in such a way that forestalling actions are necessary, and not only preventive, even if they are more multidimensional. The main aim of this understanding of care is to maintain the balance between the exploitation and protection of the human being's natural environment, which should, therefore, minimise the extent of its possible degradation.[30]

2.3. The principle of repairing damage from its source

The starting point of our consideration here is also the content of art. 174 section 2 (second sentence) of the ECT. Its analysis allows us to state that the realisation of the principle mentioned aboce comes above down to answering the question of time and place, but above all, of the method of eliminating a given ecological threat or damage. The interpretation of the mentioned article leaves no shadow of doubt in this respect: the Community legislator awaits the elimination of threats and damages at the place of origin. And what, is equally important, as quickly as possible.[31]

The simplicity of the above interpretation should not, however, mislead us. If the aim of this principle is only to achieve a state of ecological balance, or creating a safe natural environment, then it would duplicate the principle of prevention and care. Moreover, insofar as the latter principle only informs us which conditions must occur for a specific preventive measure to be applied, then the principle of repairing the damage additionally states where and when a given measure could or must find such an application.[32] Naturally, in both cases, by including the proportionality (proportion) rule presented above.

2.4. The principle of the responsibility of the polluter

Another enumeration in the art. 174 section 2 (second sentence) of the ECT, leads us to indicate not only the degree of responsibility of the polluter, but also to connect the damage that is done to the environment (regardless of whether it was deliberate or not) with the necessity of financial compensation. The latter should be in

[29] See Dieter H. Scheuing, 'Instrumente zur Durchführung des Europäischen Umweltrechts', *NVwZ*, No. 5 (1999), pp. 475-485.

[30] See. A. Epiney, *Umweltrecht…*, p. 103.

[31] See S. Schmitz, *Die Europäische Union als Umweltunion*, Berlin 1996, p. 160.

[32] See M. Burgi, 'Das Schutz- und Ursprungsprinzip im europäischen Umweltrecht', *NuR*, No. 1 (1995), pp. 11-15.

the form of either decreasing the extent of the resulting ecological threat/damage, or simply eliminating its effects. The accepted solution is not typical, as it rejects the principle that the mutual expenses of ecological damage should be borne, according to which society answers to the effects of such damages, and therefore, in effect, all tax-payers.[33]

Firstly, if one looks at the financial side of the regulation of the offender's responsibility more carefully, then it is right to also say that this regulation requires the internalisation of external (ecological) costs. Secondly, such an increased cost regarding the process of the control effectively restrains destructive behaviour in relation to the natural environment. It is difficult in this situation not to notice that the regulation of the offender's responsibility is transformed from the classical legal (political) instrument into a typical economic tool. Although this transformation is not anything inappropriate in itself, it would nevertheless be unwise to shut one's eyes to the fact that it is difficult to determine simultaneously the calculation of the costs of ecological damage, satisfying the entities interested in environmental protection, as well as its use for economical purposes.[34]

2.5. The cross-sectional clause

Accepting the cross-sectional clause (art. 6 of the ECT) as another regulation in the collection of rules concerning the Community actions with regard to the range of environmental protection does not require long procedures.[35] For a whole commentary, it is enough to indicate that the environmental protection policy – in wanting to be effective – cannot be practised in an isolated way from the remaining policies (actions) of the European Union. To put it briefly, it must include the actions of others, but they too must take it into account.

The particular meaning of the analysed clause is derived neither from including it in the form of art. 6 of the ECT to the first part of the Treaty on establishing the European Community,[36] nor from supplementing the regulation of this article by the wording of the Community's obligation to include the need of balanced development when it comes to determining and realising its policies and actions. A much more significant meaning should be placed on the cause-effect relationship between the implementation of environmental protection policy by the mMember sStates, and the need to appeal through it to the cross-sectional clause,[37] covered *implicite* in this regulation. For if it is to be remembered that environmental protection policy

[33] See J. Caspar, 'Europäisches und nationales Umweltverfassungsrecht' in H.-J. Koch (ed.), *Umweltrecht*, Köln–Berlin–München 2007, p. 53.

[34] Ibid.

[35] See C. Calliess, 'Die neue Querschnittsklausel des Art. 6 ex 3c EGV als Instrument zur Umsetzung des Grundsatzes der nachhaltigen Entwicklung', *DVBl.*, No. 11 (1998), pp. 559-568.

[36] According to the 'Amsterdam revision of 2 October 1997', *OJ (EC)*, No. C 340, 10 November 1997.

[37] See C. Calliess, 'Die neue Querschnittsklausel…', p. 564.

belongs to the executive domain of the mMember sStates, then the necessity for also taking other policies into consideration must be understandable in this situation. Hence, the appropriate coordination and cohesion of them can be ensured only by respecting the mechanism of the cross-sectional clause.[38]

3. COMMUNITY ENVIRONMENTAL PROTECTION: BETWEEN THE GUIDELINES AND THE BALANCE OF INTERESTS

The cross-sectional character of environmental protection obliges the European Union to conduct cohesive policies in the mentioned scope to a degree that treaty regulation or the proportional regulation allows for. But that is not the end of the matter. The integrity of the protection also requires an appeal to art. 95 of the ECT; that is, to the general task of the legal harmonising of national law order in the scope of the Community resulting from it. Without doubt this cross-sectional clause makes this process significantly easier, especially if we take into consideration the necessity of allowing for such a variety of policies like agriculture, industry, communication and transport, energy, scientific research, education and tourism.[39]

Assuming that a precise definition of the legal scope of art. 6 of the ECT (still) presents difficulties, it becomes necessary to enumerate the causes which are responsible for this state of affairs. One such cause might be the breadth of application of the cross-sectional clause. Its material range of application allows one to present the substantive clause not as a means of limiting the action to those fields that are defined in the Treaty, but as a regulation embracing the entire Community action. This, however, remains unclear as to whether the obligation to act according to art. 6 of the ECT refers (only) to the shaping of a given Community policy, or if it only concerns a determined Community means of action.[40] Although the doctrine does not give an unambiguous answer, it remains unquestionable that the reference to single means of action cannot be understood as the necessity of invocating, in their case, the requirements of environmental protection every time. For if this took place, it would only mean that the mentioned invocation in is not possible if applied to another means of action.

The point of the above interpretation can also be determined, and in such a way, that the requirements of environmental protection in the scope of Community activity are taken into consideration. It remains indifferent for achieving the assumed aim whether the appeal always takes place in the same legal act or not. Therefore, this

[38] The inclusion of the cross-sectional clause to other European Union policies is the best indication of its growing significance. In this interpretation they are: art. 151 section 4 of the ECT (culture), art. 152 section 1 of the ECT (public health), art. 153 section 2 of the ECT (consumer protection), art. 157 section 3 of the ECT (economic policy), art. 159 paragraph 1 of the ECT (regional policy) and art. 178 of the ECT (cooperation for development).

[39] See J. Caspar, *Europäisches und nationales…,* p. 53.

[40] See C. Calliess, 'Die neue Querschnittsklausel…', p. 566.

allows us to finally say that appealing to the action of art. 6 of the ECT can only be interpreted in such a way that no Community action can be undertaken if environmental protection requirements are not included at the same time.

If the first cause of the difficulties over the interpretation of art. 6 of the ECT is the breadth of application of the cross-sectional clause, then the second cause are its reference points. Looking at this from both the systematic and the teleological perspective, it can be said that during the application of the cross-sectional clause, included aspects, i.e. environmental protection requirements, should be so widely covered to make their synonimisation with the entire policy of environmental protection possible, according to art. 174 of the ECT.[41] This observation makes sense, because isolating this, or any aspect of the analysed field, would inevitably distort the real picture of the dependence between the need to protect the environment and the need to exploit it economically.

As far as taxonomy enables us to indicate the (appropriate) proportions in the method of perceiving environmental protection, then the teleological interpretation in the case of the cross-sectional clause leads to the conclusion that emphasising the cause-effect relationship of art. 174 of the ECT and other articles of this Treaty is neither a false procedure, nor particularly random. Otherwise, this would mean that the expectations defined by the Community legislator in reference to environmental protection policy are only a depository of phoney slogans and appeals. Meanwhile, the Community requirement of including the support of the balanced development policy in actions proves that this is not the case. Hence, because of this, the cross-sectional clause can be treated like a vehicle that moves the rule of the balanced development to other Community policies.[42]

The solutions above do not, however, explain adequately – the third cause – in what way or what weight these values can be (or should be) applied to the particular requirements of environmental protection. While it is true that the cross-sectional clause allows us to assume that emphasising the significance of ecological matters is reflected in Community action, but this does not necessarily mean that thanks to the cross-sectional clause they are considered to be a priority. The construction of the Treaty contradicts this, according to which the Community practises particular policies simultaneously.

Bearing in mind the actual state presented, one might make the judgment that applying the cross-sectional clause formulated in the art. 6 of the ECT results in the recognition of ecological matters as constituent parts of the planned action of the Community. How this recognition is to proceed is not said in this article and, *ipso facto*, no hierarchy of aims can be derived from applying the cross-sectional clause. Hence, the requirements and aims of environmental protection must be included every time the Community undertakes a policy (action). At the same time, *à rebours*, applying the cross-sectional clause imposes on parties the obligation of including in

[41] See A. Epiney, *Umweltrecht...*, p. 111.

[42] Ibid., p. 112.

all their Community policies (actions) appropriate measures that fulfil the requirements of protecting the natural environment.[43]

In all these observations, it is impossible to ignore the fact that art. 174 section 3 of the ECT contains the so-called directives of proceedings, or in other words, the criteria of balance in case of a conflict of legal goods (interests), which necessarily need to be included in the Community's environmental. Here, we speak of the available scientific-research data, environmental conditions in the various regions of the Community, the potential benefits and costs that may result from acting or not acting, and of the economic and social development of the Community as a whole, as well as of the balanced development of its regions.

Because the mentioned criteria are only 'taken into account' by the Community when it prepares policies in the sphere of environmental protection, they do not constitute, *ipso facto*, the necessary condition for it to undertake actions. Moreover, they influence neither the shape, nor the scope of Community competencies. Such a formulated dictum leads to a dead end. Mainly because the case of art. 174 section 3 of the ECT proves that what is meant here what is spoken of is the legally binding regulation, which is not at the Community legislator's disposal.[44]

Despite this, the content of art. 174 section 3 of the ECT is limited, as the Community legislator includes (after all) the mentioned aspects, a particular effect cannot be derived on the basis of the order of inclusion. Therefore, in the implemented solutions, it becomes necessary to take into account the principle of balance in case of the conflict of goods (interests). And this goes for both during the actual proceedings, as well as in reference to the effect of constitution of law.[45] Because the mentioned criteria and requirements resulting from them allow us to demarcate a framework of constituting laws only in a strongly limited dimension, then each infringement must be considered to be extremely difficult to prove. Had it taken place, the only way out would be to acknowledge the legal act as being void.[46]

The mentioned invalidity clearly shows that the presented regulations have a binding character. Neither their relatively limited amount of content description, nor the broad liberty in action of the Community legislator changes this state of things. Also the argument that the contained dispositions in art. 174 sections 1-3 of the ECT do not contain – it is acceptable to compare them like this – any mathematical formulas, must be rejected and acknowledged as not having an influence on the legal character of these norms.[47] One might take it for granted that the need of interpretation has nothing to do with its legal force. Therefore, assuming that it is

[43] See M. Wasmeier, 'Die Integration des Umweltschutzes als allgemeine Auslegungsregel des Gemeinschaftsrechts. Das EuGH-Urteil vom 10.6.1999 – Rs. C-346/97, Braathens Sverige AB (Transwede Airways), EWS 1999, 354', *EWS*, No. 2 (2000), pp. 47-52.

[44] See R. Streinz, *Europarecht*…, Rdnr. 1115-1116, pp. 449-450.

[45] See A. Epiney, *Umweltrecht*…, p. 114.

[46] See jurisdiction of the Court of Justice of the EU of 14 July 1998 – C-284/95 – Safety Hitech Srl vs. S. & T. Srl, in EuGH Slg. 1998, I-4301.

[47] See I. Appel, 'Europas Sorge...', p. 395.

a certainty that the interpretation of a determined norm is needed has nothing to do with its legal force; therefore, we must indicate that such a relationship comes about in norms constructed in a conditional or concluding (final) course. Such a construction unquestionably embraces the analysed regulations, even when a desired solution[48] cannot always be given a specific case.

A completely different meaning, however, should be ascribed to the regulations contained in art. 174 section 2 of the ECT, if one looks at it not as legitimising the actions of the Community. Because the derived law may be created on the basis of treaty law, then a character specifying the analysis of action (proceedings) within the European Union's limits should be acknowledged to the mentioned regulations. However, this must be qualified by stating that the term 'specifying' cannot be understood here as an imperative.

In this situation, the term 'regulations of the best possible protection of the environment' formulated by Martin Zuleega,[49] which was coined during the period of discussion on the Single European Act, does not lose its topicality. If one were to agree with the opinion that the statements of successive treaty revisions,[50] that is art. 6; art. 95 sections 3, 4; art. 174 section 2 and art. 176 of the ECT, allows one to interpret a tendency that gives the natural environment the best protection possible, then it is difficult to reject the recognition of this part of Community law as a matter of regulation in Zuleega's conception.

On the other hand, however, there is no way of shutting out critical opinions. It is rightly brought up that although the significant contents of a regulation understood in such a way are derived from a treaty statements that does not in any way mean that it can be interpreted unambiguously. And if this was not enough, it is additionally emphasised that in the Community's jurisdiction of the Court of Justice, no loops can be found in this respect. Even the most elaborate discussion cannot change this state of affairs – a discussion, if the query is not misleading which is conducted almost exclusively in German literature of the subject.[51]

The discussion, no matter how significant it is, cannot and should not conceal a much more important matter; namely, the implementation of Community law of environmental protection.[52] We know that the implementation of this law at the national level is often (extremely) late, sometimes incomplete, and at other times incor-

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48 See G. Winter, 'Umweltrechtliche Prinzipien des Gemeinschaftsrechts', *ZUR Sonderheft* (2003), pp. 137-145. Here p. 139.

49 See M. Zuleeg, 'Vorbehaltene Kompetenzen der Mitgliedstaaten der Europäischen Gemeinschaft auf dem Gebiete des Umweltschutzes', *NVwZ*, No. 4 (1987), pp. 280-286.

50 See A. Epiney, 'Die umweltpolitischen Handlungsprinzipien in Art. 130r EGV: politische Leitlinien oder rechtsverbindliche Vorgaben? Zu den Urteilen des EuGH in den Rs. C-284/95, C-341/95 (Safety Hi-Tech) vom 14.7.1998', *NuR*, No. 4 (1999), pp. 181-185 and A. Jannasch, 'Einwirkungen des Gemeinschaftsrechts auf den vorläufigen Rechtsschutz', *NVwZ*, No. 5 (1999), pp. 495-502.

51 See A. Epiney, *Umweltrecht*…, p. 118. Further examples also can also be found here.

52 See S. Albin, 'Zwangsgelder, Mittelkürzung und Umweltinspektionen – Neueste Entwicklungen bei der Vollzugskontrolle von EU-Umweltrecht', *DVBl.*, No. 20 (2000), pp. 1483-1492.

rectly introduced.[53] Surprisingly, this happens independent of the political system of a Member State, the structure of the executing government, and finally, the administrational possibilities (abilities).

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[53] See H. Sendler, 'Deutsche Schwierigkeiten mit dem EG-Recht. Zur Misere der Umsetzung von EG-Umweltschutz-Richtlinien', *NJW*, No. 39 (2000), pp. 2871-2872; E. Rehbinder, R. Wahl, 'Kompetenzprobleme bei der Umsetzung von europäischen Richtlinien', *NVwZ*, No. 1 (2002), pp. 21-28; A. Fisahn, 'Probleme der Umsetzung von EU-Richtlinien im Bundesstaat', *DÖV*, No. 6 (2002), pp. 239-246.

Professor Jan Wiktor TKACZYŃSKI (1960) studied political science, economic geography and Slavic studies at the Jagiellonian University in Cracow, and then at LMU in Munich. From 1989 to 1992, he was awarded a scholarship from the Bavarian Ministry of Culture and Education. He passed his doctoral degree in 1992 in geopolitics, which focussed on Germany and Poland, and was supervised by Professor Heinz Laufer at LMU Munich. There, in the years 1993-1994, he graduated from post-graduate studies in the area of economics. From 1994 to 2001 he was a research employee of the Institute of Public Economy and Administration at the University of the German Armed Forces. In 2000, he completed his post-doctoral degree before the Commission of the Law and Administration Faculty of the Jagiellonian University on the basis of his paper: *Między unitaryzmem a federalizmem. Unia Europejska w świetle doświadczeń ustrojowych Republiki Federalnej Niemiec* [Between Unitarism and Federalism. The European Union in the Light of the Experiences of the Political System of the Federal Republic of Germany]. In the years 2001-2004, he was a professor of European studies at the Nicolaus Copernicus University. From 2004, he was a professor of European Studies at the Jagiellonian University. In 2008, he received the title of professor of humanities studies. He is the author or co-author of 16 books. Recently, he published among others: *Die Fonds der Europäischen Union* (2001), *Varia europejskie* [European Varia] (2002), *Business Promotion Activities in Poland and Germany* (2003), *Existenzgründung in Deutschland* (2004), *Ustrój federalny Niemiec a system decyzyjny Unii Europejskiej* [The Federal Political System of Germany versus the Decision-Making System of the European Union] (2005), *Unia Europejska. Wybrane aspekty ustrojowe* [The European Union. Chosen Political System Aspects] (2007), *Fundusze Unii Europejskiej 2007-2013. Cele – działania – środki* [European Union Funds 2007-2013. Aims – Actions – Means] (2008) and *Leksykon Funduszy Unii Europejskiej* [Lexicon of European Union Funds] (2009).